

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WYNN LAS VEGAS, LLC

and

KELI P. MAY, an Individual

Case No. 28-CA-155984

and

KANIE KASTROLL, an Individual
_____ /

Case No. 28-CA-157203

**RESPONDENT WYNN LAS VEGAS, LLC'S CROSS-
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND RECOMMENDED ORDER**

KAMER ZUCKER ABBOTT
Gregory J. Kamer, Esq.
Nevada Bar No. 0270
R. Todd Creer, Esq.
Nevada Bar No. 10016
3000 West Charleston Boulevard, Suite 3
Las Vegas, Nevada 89102
Tel: (702) 259-8640
Fax: (702) 259-8646

Attorneys for Respondent
Wynn Las Vegas, LLC

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for Respondent Wynn Las Vegas, LLC ("Wynn"), by and through its counsel of record, the law firm of Kamer Zucker Abbott, files these Cross-Exceptions to the Administrative Law Judge's Decision and Recommended Order, issued by Administrative Law Judge Gerald M. Etchingham ("Judge") on September 26, 2016. Wynn takes exception to the following:

1. The Judge's factual finding that payroll errors were "common" for security officers stationed at the Wynn Design and Development ("WDD") Flex Building. ALJD: 16:10-12.

2. The Judge's factual finding that Security Officer Keli May ("Officer May") would discuss the payroll error issues with fellow security officers at least once a week. ALJD: 16:20-21.

3. The Judge's factual finding that Officer May would discuss the payroll errors with Officer Alameda every two weeks. ALJD:16:21-22.

4. The Judge's factual finding that Mr. Alameda would inform Officer May of any security officers' payroll error because "usually if one security officer's time was incorrect then the other security officer on the same shift would also have an error in their pay." ALJD: 16:23-25.

5. The Judge's factual finding that payroll errors were a "constant" topic of discussion between Officer May and Officer Rick Rankin and other security officers. ALJD: 16:28-31.

6. The Judge's factual finding that Mr. Robert Haire refused to enter Officer May's missing time for Friday, June 12, "because it was his day off and apparently he did not believe what May was telling him." ALJD: 17:31-32.

7. The Judge's finding that the "majority of employees, supervisors, and managers" were away on lunchbreak or in closed door meetings in the security department when Officer May returned to the security office and had her outburst. ALJD: 19:1-4.

8. The Judge's finding that Officer May tried to whisper to get Manager Tammy Howell's attention during a meeting in the security office. ALJD: 19:16-18.

9. The Judge's finding that Officer May stood by the copier for 5-10 minutes waiting for the meeting in Manager Alfonso Romo's office to end. ALJD: 19:25-27.

10. The Judge's finding that no one other than Officer Rankin was standing near Officer May when she spoke to Officer Rankin. ALJD: 19:31-32.

11. The Judge's credibility determination in accepting Officer May's testimony that Officer Rankin stated, "get your fucking ass over there and demand your money right now" over Officer Rankin's own testimony in which he denied cursing. ALJD: 19:37-41; 23: 4-7. Specifically, the Judge also discredited Officer Rankin's testimony denying the use of profanities being commonplace in the security offices. Id.

12. The Judge's credibility determination in discrediting Officer Rankin's testimony by speculating that Officer Rankin would not admit to the use of foul language as a result of a prior discipline for improper conversations at work. ALJD: 19:41-46.

13. The Judge's finding that there was a culture of "free use of profanities in the security offices by managers and others." ALJD: 19:41-43.

14. The Judge's finding that Officer Rankin and Officer May's discussion in the security office on June 19, 2015 consisted of Officer May's unpaid wages, how often that type of error happened, and how it should not ever happen, let alone occur frequently. ALJD: 20:15-17.

15. The Judge's credibility determination that Officer Rankin's testimony regarding managers cursing was credible. ALJD: 23: 13-16. Officer Rankin testified that he had heard Manager Romo use phrases like "son of a bitch" and "you guys get your asses in the briefing office." Id.

16. The Judge's credibility determination that Officer May was direct and forthright in her testimony. ALJD: 23:29-30.

17. The Judge's credibility determination that Officer May's testimony was believable in that she tried to correct her unpaid wages problem with no result which led to her "frustrated outburst" in the security office. ALJD: 23:30-33.

18. The Judge's finding that Officer May engaged in protected activity when she complained to Officer Rankin regarding a delay in payment of her wages. ALJD: 33:12-15.

19. The Judge's finding that Officers May and Rankin met during their lunch breaks at the security office to discuss with management the frequent problems experienced by all security officers working at Respondent's WDD Flex Building. ALJD: 32:23-25.

20. The Judge's finding that Officers May and Rankin were acting in concert to try to improve the terms and conditions of employment on behalf of themselves and other security officer employees. ALJD: 32:25-27.

21. The Judge's finding that Officer May's comments on June 19 with Officer Rankin during their lunch breaks, though containing profanities, were protected conduct involving a group grievance from security officers working at the WDD Flex Building regarding frequent underpayment of wages. ALJD: 33:32-35.

22. The Judge's finding that Officer May's comments were not so egregious as to exceed the protection of the National Labor Relations Act ("the Act"). ALJD: 34:1-2.

23. The Judge's decision to disregard the well-established four (4) factor test enumerated in Atlantic Steel Co., 245 NLRB 814 (1979), which states that when considering whether an employee loses protection of the Act, a Judge is to look to: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of an employees' outburst, and (4) whether the outburst was provoked by the employer's unfair labor practices. ALJD: 34:2-7.

24. The Judge's reliance on the totality of the circumstances test from Richmond District Neighborhood Center, 361 NLRB No. 59 (2015). ALJD: 34:16-24.

25. The Judge's finding that Officer May's outburst was provoked by management's "disinterested and unsuccessful efforts" to correct her payroll issue. ALJD: 34:36-41.

26. The Judge's finding that Officer May's outburst was "impulsive" and "reflected her exasperated frustration after months of concertedly protesting disrespectful treatment by managers" pertaining to the underpayment of wages. ALJD: 34:31-34.

27. The Judge's finding that the time keeping system errors going "unchecked from 2014 to 2015" culminated in Officer May's June 19, 2015 outburst. ALJD: 34:35-37.

28. The Judge's finding that the location of Officer May's outburst in the security office did not lose the status of protected activity and his reliance on the assertion that the security office was "mostly empty." ALJD: 34: 39-44.

29. The Judge's finding that there is little evidence that Officer May's comments interrupted Wynn's work environment or its relationship with its customers and his minimized emphasis on Ms. Boguille's testimony pertaining to her interrupted work. ALJD: 34: 43-44.

30. The Judge's finding that Officer May's outburst echoed previous complaints about management's lax timekeeping methods that frequently underpaid its security officer employees at the WDD Flex Building. ALJD: 35:1-3.

31. The Judge's finding that Wynn tolerated the widespread use of profanity in the workplace and using the finding to hold that Officer May's use of profanity would not lose protection of the Act for that reason. ALJD: 35:5-6.

32. The Judge's finding that Wynn's Code of Conduct does not prohibit vulgar or profane language when it states that employees are to refrain from using "offensive language." ALJD: 35:12-16.

33. The Judge's finding that Wynn did not issue similar discipline to employees who had used profane language in the "same circumstances here." ALJD: 35:18-21.

34. The Judge's inference that Wynn does not usually discipline employees for the kind of conduct that Officer May engaged in based on the fact that Wynn did not discipline Officer Rankin for engaging in the same conversation and uttering profanities. ALJD: 35:18-25.

35. The Judge's finding that Wynn's Inappropriate Conduct Rule is overbroad. ALJD: 35:26-27.

36. The Judge's finding that Wynn's Inappropriate Conduct Rule is in violation of the Act. ALJD: 35:26-27.

37. The Judge's finding that Wynn failed to show a "legitimate and substantial business justification" for its Inappropriate Conduct Rule. ALJD: 35:30-31.

38. The Judge's finding that Wynn violated Section 8(a)(1) by unlawfully suspending Officer May for her activity on June 19, 2015. ALJD: 35:36-38.

39. The Judge's finding that Wynn violated the Act by issuing Officer May a second written warning for her June 19, 2015 conduct. ALJD: 36:3-4.

40. The Judge's finding that Officer May's conduct did not warrant discipline in that it did not interfere with the work of other employees or the employer's operations. ALJD: 36:9-30.

41. The Judge's finding that the Inappropriate Conduct Rule would limit employees from engaging in communications concerning their employment. ALJD: 38:1-5.

42. The Judge's finding that the Inappropriate Conduct Rule prohibiting misconduct that affects job performance is prohibited under case law prohibiting negative speech. ALJD: 38:6-13.

43. The Judge's finding that the No Photographs, PDAs, Messaging, Calls, or Recordings Rule prohibits Section 7 activity. ALJD: 39:14-19

44. The Judge's finding that the No Photographs, PDAs, Messaging, Calls, or Recordings Rule is not narrowly tailored to a legitimate business interest. ALJD: 40:6-7.

45. The Judge's finding that Wynn's Restricted Access Rule is overbroad. ALJD: 41:16-17.

46. The Judge's finding that Wynn's Restricted Access Rule is in violation of Section 8(a)(1) of the Act. ALJD: 41:16-17.

47. The Judge's finding that the Restricted Intellectual Property Rule may chill employees from using Wynn's logo while engaged in Section 7 activities. ALJD: 42:5-8.

48. The Judge's finding that the Restricted Intellectual Property Rule violates Section 8(a)(1). ALJD: 42:12-14.

49. The Judge's Conclusion of Law that Officer May was engaged in protected activity and therefore Wynn violated the Act by issuing discipline. ALJD: 43:28-32.

50. The Judge's Conclusion of Law that by maintaining the Inappropriate Conduct Rule, the No Photographs, PDAs, Messaging, Calls, or Recordings Rule, the Restricted Access Rule, and the Restricted Intellectual Property Rule, Wynn violated the Act. ALJD: 43:33-36; 44:1-36; 45:1-2.

DATED this 28th day of November, 2016.

Respectfully submitted,

KAMER ZUCKER ABBOTT

By: _____


Gregory J. Kamer, Esq.

Nevada Bar No. 0270

R. Todd Creer, Esq.

Nevada Bar No. 8033

3000 West Charleston Boulevard, Suite 3

Las Vegas, Nevada 89102

Tel: (702) 259-8640

Fax: (702) 259-8646

Attorneys for Respondent

Wynn Las Vegas, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I did serve a copy of the foregoing
**RESPONDENT WYNN LAS VEGAS, LLC'S CROSS-EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

Julia M. Durkin, Esq., Field Attorney
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294
Julia.Durkin@nlrb.gov

**VIA ELECTRONIC MAIL AND VIA
CERTIFIED MAIL WITH RETURN
RECEIPT**

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570

VIA ELECTRONIC FILING

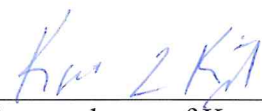
Ms. Keli May
10213 Quaint Tree Street
Las Vegas, Nevada 89183-4252

**VIA CERTIFIED MAIL WITH
RETURN RECEIPT**

Ms. Kanie Kastroll
8593 Peaceful Dreams Street
Las Vegas, Nevada 89139-7051

**VIA CERTIFIED MAIL WITH
RETURN RECEIPT**

By:


An employee of Kamer Zucker Abbott